Nos. 91-261 and 91-274

In the Supreme Court of the United States

OCTOBER TERM, 1991

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Acting Deputy General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

KENNETH W. STARR
Solicitor General

MAUREEN E. MAHONEY
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Sections 8(e) and 8(f) of the National Labor Relations Act expressly permit private employers to implement agreements requiring all contractors performing work on a construction project to adhere to a collective bargaining agreement that establishes labor terms and union recognition for the project as a whole. The question presented is whether the doctrine of implied preemption under the NLRA nevertheless prohibits a state agency from acting in its proprietary capacity to implement such an agreement for a state public works construction project.

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This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Massachusetts Water Resources Authority (MWRA) is a governmental agency authorized by the Massachusetts legislature to provide water-supply services

and sewage-collection, treatment and disposal services for the eastern half of Massachusetts. Following a lawsuit arising out of the discharge of sewage into Boston Harbor in violation of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, the MWRA was ordered by a federal district court to meet a detailed timetable to carry out the clean-up of the Harbor. It is estimated that this task, known as the Boston Harbor Clean-up Project, will require the expenditure of $6.1 billion for public works over a ten-year period. See *United States* v. *Metropolitan District Comm'n*, 757 F. Supp. 121, 123 (D. Mass.), aff'd, 930 F.2d 132 (1st Cir. 1991).

The means of carrying out the project are set forth in the MWRA's enabling statute, 1984 Mass. Acts 372, and the Commonwealth's public bidding laws, Mass. Gen. Laws ch. 149, §§ 44A-44L & ch. 30, § 39M (& Supp. 1990). See Pet. App. 3a. Pursuant to those laws, the MWRA provides the funds for construction (assisted by state and federal grants), owns the property to be built, establishes the bid conditions, and makes all contract awards. MWRA Pet. App. 3a, 74a.[1]

2. In April 1988, MWRA retained Kaiser Engineers, Inc. (Kaiser), a private construction contractor, as its program/construction manager. Kaiser's primary function is to manage and supervise the ongoing construction activity. Another important function of Kaiser, however, was to advise MWRA regarding development of a labor-relations policy that would maintain labor-management peace for the duration of the project. MWRA had already experienced work stoppages and informational picketing at various sites. MWRA was concerned that because of the scale of the project and the number of different craft skills involved, it was vulnerable

[1] "MWRA Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 91-274.

to numerous delays, thus placing the court-ordered time schedule in jeopardy and subjecting MWRA to contempt citations. These concerns were heightened by the limited access to the major work site, Deer Island, which would enable a small number of pickets to stop the entire project. MWRA Pet. App. 3a-4a, 74a-75a.

Aware of these concerns, Kaiser recommended to MWRA that it be permitted to negotiate with unions in the building and construction trades, through the Building and Construction Trades Council (Council), in an effort to arrive at an agreement that would assure labor stability over the life of the project. Any agreement would be subject to review and final approval by MWRA. MWRA Pet. App. 75a, 105a. MWRA accepted Kaiser's recommendations, and in May 1989, Kaiser and the unions negotiated an agreement—the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement (the Master Labor Agreement). See *id.* at 107a-140a.

The Master Labor Agreement states that it is the policy of MWRA that "the construction work covered by this Agreement shall be contracted to Contractors who agree to execute and be bound by the terms of this Agreement." MWRA Pet. App. 109a. It requires all contractors to recognize the Council as the bargaining representative for all craft employees performing work on the project, to hire workers through the hiring halls of the Council's constituent unions, to require hired workers to join the relevant union within seven days, to follow specified dispute-resolution procedures, to apply the Council's wage, benefit, seniority, apprenticeship and other rules, and to make contributions to the Council unions' benefit funds. In return, the unions agreed not to engage in any strikes or work stoppages during the ten-year life of the project. *Id.* at 5a-6a, 32a, 75a.

On May 28, 1989, MWRA approved the Master Labor Agreement as the labor policy for the project and directed that Specification 13.1 be added to the bid specifications

for all new construction work.[2] MWRA Pet. App. 5a, 75a. Specification 13.1 provides, in pertinent part, that:

> [E]ach successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the [Master Labor Agreement] as executed and effective May 22, 1989, by and between [Kaiser], on behalf of [MWRA], and the [Trades Council] * * * and will be bound by the provisions of that agreement in the same manner as any other provision of the contract * * *.

Id. at 141a-142a. Successful bidders are accordingly required to abide by the Master Labor Agreement, but the bidding is not restricted to union contractors. The specifications provide that any qualified bidder may compete for a contract, without regard to whether the contractor has a pre-existing bargaining relationship with a union, and the contract must be awarded to the lowest qualified bidder.

Nonunion bidders are also not required to sign any other agreement with any unions for other projects. In addition, although a contractor must agree to use the local union's job referral system for labor on the project (or to give preference to applicants referred by the local union if the union has no such referral system), the job referral system must be operated in a non-discriminatory manner so that employees who are not already union members are nevertheless eligible for project work. MWRA Pet. App. 103a-104a, 110a, 116a-117a.

3. On March 5, 1990, respondent Associated Builders and Contractors of Massachusetts/Rhode Island (ABC)—

[2] Massachusetts law expressly requires the MWRA, as well as other procuring agencies, to award contracts pursuant to a competitive bidding process. See page 2, *supra*; Pet. App. 3a; *Modern Continental Construction Co.* v. *Lowell*, 465 N.E.2d 1173 (Mass. 1984).

an association of nonunion contractors—filed this suit in the United States District Court for the District of Massachusetts seeking an injunction barring enforcement of Bid Specification 13.1 on the ground, *inter alia*, that it impermissibly interferes with the system of free collective bargaining contemplated by the National Labor Relations Act (NLRA). On April 11, 1990, the district court issued a memorandum and order rejecting ABC's preemption and other claims, and denied a preliminary injunction. MWRA Pet. App. 72a-83a.

In the meantime, another contractors' association, the Utility Contractors Association of New England, had filed an unfair labor practice charge with the National Labor Relations Board (NLRB), alleging that Kaiser's project agreement with the Council violates the NLRA. On June 25, 1990, after the district court had ruled, the General Counsel of NLRB refused to issue a complaint, finding that the agreement is lawful under the construction industry proviso to Section 8(e) of the NLRA, 29 U.S.C. 158(e), and is a valid prehire agreement under Section 8(f), 29 U.S.C. 158(f). See *Building & Trades Council, et al. (Kaiser Engineers, Inc.)*, Case 1-CE-71, GC Advice Memo (reproduced at MWRA Pet. App. 88a-93a).

4. On October 24, 1990, a panel of the First Circuit reversed the district court's decision, agreeing with ABC's contention that MWRA's Bid Specification 13.1 is preempted by the NLRA. MWRA Pet. App. 49a-71a. On rehearing en banc, the court of appeals, by a 3-2 vote, adhered to that ruling. *Id.* at 1a-48a.[3]

The en banc majority believed that "the present case is most heavily influenced by the Supreme Court's hold-

[3] After issuance of the panel's decision, the district court entered a preliminary injunction barring enforcement of Bid Specification 13.1. The en banc court continued that injunction in effect pending rehearing. MWRA Pet. App. 86a-87a. The ultimate decision by the en banc court, which affirmed the panel's decision, continues that injunction in effect. *Id.* at 31a.

ings in the *Golden State Transit Corp.* cases,[4] which relied and expanded upon the *Machinists* doctrine."[5] MWRA Pet. App. 15a. It understood "the lesson of the *Golden State* cases [to be] that, where interference into the collective bargaining process by the state is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." *Id.* at 30a. In this case, the majority concluded that Bid Specification 13.1, by requiring all contractors to comply with the Master Labor Agreement negotiated by Kaiser, constitutes direct interference with the collective bargaining process. *Id.* at 17a. The majority recognized that Sections 8(e) and 8(f) of the NLRA expressly permit such special contractual arrangements in the construction industry, *id.* at 22a-24a, and that under those provisions, "the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." *Id.* at 24a. But it found the legality of the agreement itself to be "irrelevant" to the question whether Bid Specification 13.1—by which MWRA requires adherence to that agreement—is preempted. *Id.* at 24a-25a.

In dissent, Chief Judge Breyer, joined by Judge Campbell, believed the "only question in this case is whether the NLRA forbids the MWRA, because it is a state agency, to do what the Act explicitly permits a private contractor to do." MWRA Pet. App. 32a. In his view, far from upsetting the balance between labor and management that Congress intended, the MWRA's contracting decision affects labor-management relations "only to the extent that Congress foresaw and (with respect to general contractors) explicitly authorized" in Sections 8(e) and 8(f). Pet. App. 34a.

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[4] See *Golden State Transit Corp.* v. *City of Los Angeles*, 475 U.S. 608 (1986) (*Golden State I*), and *Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*).

[5] See *Lodge 76, Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976).

DISCUSSION

In our view, the court of appeals erred. It should have found that Massachusetts did not exceed its legitimate authority to specify the terms and conditions for contracting on its own public works project. Implied preemption under the NLRA is inappropriate in this context because the Commonwealth has not sought to regulate collective bargaining in Massachusetts. It has only sought to exercise a proprietary right that Congress expressly conferred on private employers—the right to require all contractors working on a construction project to adhere to a collective bargaining agreement with a union. The NLRA was designed to avoid undue interference in the States' conduct of their own affairs by excluding States from the definition of "employers" covered by the Act, yet the decision below expands the implied preemption doctrine to deny States rights that are afforded even to private employers.

Although there is as yet no conflict in the decisions of the courts of appeals, we believe that the issue is of such substantial importance that review is warranted. This Court's precedents do not clearly resolve the preemption issue that is thoroughly discussed in the divided opinions of the en banc court below. This uncertainty poses significant difficulties for States seeking to assure stability in the performance of their public works projects. In this case alone, the decision has nullified a key contractual provision in the massive public works project for the clean-up of Boston Harbor—a project that must be completed according to a schedule established by the judgment in a suit brought by the United States to remedy substantial violations of the Clean Water Act. The decision similarly threatens the validity of other project agreements that have been utilized in connection with construction of a wide variety of other major public works across the country, and will serve to deter the States from utilizing such terms in new public works projects until the issue is finally settled. We therefore

believe that it is appropriate to grant certiorari in this case.

1. The holding by the court of appeals majority that federal law preempts MWRA's requirement that contractors on MWRA's construction project abide by the labor agreement previously negotiated by its construction manager rests primarily on that branch of NLRA preemption law known as *Machinists* preemption. MWRA Pet. App. 15a, 30a; see *Machinists* v. *Wisconsin Employment Relations Comm'n*, 427 U.S. 132 (1976); see also *Teamsters* v. *Morton*, 377 U.S. 252 (1964). This Court has explained that the *Machinists* doctrine is designed "to govern pre-emption questions that arose concerning activity that was neither arguably protected * * * nor arguably prohibited" by the NLRA's specific terms. *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 749 (1985).[6] Under that doctrine, the courts must determine if a State's regulation of conduct conflicts with Congress's intention that certain labor-related conduct remain "unregulated" and left to "the free play of economic forces." *Machinists*, 427 U.S. at 140.

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[6] The *Machinists* doctrine is distinct from the other major branch of NLRA preemption doctrine—*Garmon* preemption—which governs cases involving state regulation of conduct that is either arguably protected or arguably prohibited by the NLRA's specific regulatory terms. See *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959); see also *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. at 748-751 (describing "two distinct NLRA preemption principles").

Although relying primarily on the *Machinists* doctrine, the majority below expressed the view that the *Garmon* preemption doctrine also "most likely applies to Specification 13.1." MWRA Pet. App. 30a; see also *id.* at 15a, 21a. The only explanation for this view was an assertion that the agreement's provision for union recognition interferes with employee rights under Section 7 of the NLRA, 29 U.S.C. 157. Pet. App. 21a. However, as we explain at pages 9-10, *infra*, Section 8(f) of the NLRA specifically sanctions prehire agreements in the construction industry and protects employee free choice by permitting employees to file a petition for a representation election during the term of such an agreement.

The state action in issue here does not cause any impermissible interference with federal labor policy, because the use of binding project labor agreements in the construction industry is specifically sanctioned by Sections 8(e) and 8(f) of the NLRA. Section 8(e) ordinarily prohibits agreements between an employer and a union that preclude an employer from doing business with any other party, such as a non-union contractor. The section contains a "construction industry proviso," however, which nevertheless permits preclusive arrangements between a union and an employer in the construction industry that concern the contracting or subcontracting of work to be performed at a construction jobsite. Furthermore, Section 8(f) of the NLRA also adopts a special rule of labor relations for the construction industry by permitting "prehire agreements" under which employers will recognize unions as bargaining representatives of employees who have not yet been hired.[7]

Operating together, Sections 8(e) and 8(f) validate project labor agreements in the construction industry—collective bargaining agreements that establish labor terms and union recognition for a construction project as a whole, and that require all contractors and subcontractors who are subsequently engaged to work on the project to agree to be bound by the agreement's provisions. See *Jim McNeff, Inc.* v. *Todd*, 461 U.S. 260, 265-266, 270 n.9 (1983); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 659-660 & n.12, 662, 663 & n.15 (1982). Accordingly, both the majority and the dissenters below agreed that there would have been no interference with or distortion of the economic forces that Congress expected to govern labor relations in the construction industry if the project labor agreement chal-

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[7] To protect employee free choice, however, Section 8(f) contains a proviso that permits employees, once hired, to utilize the NLRB election process if they choose to reject the bargaining representative, or to cancel the union security provisions of the prehire agreement.

lenged in this case had been entered into solely by a private general contractor such as Kaiser. MWRA Pet. App. 24a, 34a-35a. They disagreed, however, on whether it makes a difference that an agency of the Commonwealth of Massachusetts (MWRA), rather than a private party, authorized negotiation of the agreement and then effectuated it by requiring contractors to adhere to its terms as a condition of performing work on the state-owned project. *Id.* at 27a-28a, 35a, 40a-41a.

2. a. In finding MWRA's Bid Specification 13.1 preempted, the majority relied principally upon this Court's decisions in the *Golden State* cases. See note 4, *supra*. In *Golden State I*, the Court held that the city's action in conditioning renewal of the company's taxicab operating license on the company's settlement of its labor dispute with the union by a certain date was preempted by the NLRA. The Court reasoned that the city had "[entered] into the substantive aspects of the bargaining process to an extent Congress has not countenanced" by setting "time limits on negotiations [and] economic struggle." 475 U.S. at 616 (quoting *Machinists*, 427 U.S. at 149). In *Golden State II*, the Court held that the company was entitled to sue for compensatory damages under 42 U.S.C. 1983, because the city's action in violating the company's "right to use permissible economic tactics to withstand the strike" deprived it of "a personal liberty" guaranteed by federal law. 493 U.S. at 112.

The majority below read the *Golden State* cases as establishing an absolute rule that "where interference into the collective bargaining process by the State is *direct*, an asserted state interest of the type at issue here, whether 'proprietary' or otherwise, cannot justify the interference." MWRA Pet. App. 30a. The *Golden State* decisions, however, do not create any absolute preemption policy. Rather, the test under *Golden State* is whether the State has "[entered] into the substantive aspects of the bargaining process *to an extent Congress has not countenanced.*" *Golden State I*, 475 U.S. 616 (emphasis

added) (quoting *Machinists*, 427 U.S. at 149). Thus, the *Golden State* decisions require inquiry into whether the particular state action conflicts with an intention by Congress to leave the specific conduct involved to the free play of economic forces. In this case, the dissenting judges below correctly concluded that MWRA's actions are in all relevant respects indistinguishable from those of private contractors that are expressly permitted by the NLRA *despite* their potential impact on the free play of economic forces between other contractors and their employees on a construction project, and that those actions do not affect the NLRA's operation in any ways unintended by Congress.

The first step in the *Golden State/Machinists* analysis is to identify the precise right that the NLRA assertedly "protect[s] against governmental interference." *Golden State II*, 493 U.S. at 108. In the view of respondents and the majority below, the protected right is the right of contractors "to negotiate their own terms of employment or to operate on a non-union basis." Br. in Opp. 4; MWRA Pet. App. 18a, 21a. Although employers in other industries may have that right, the construction industry proviso to Section 8(e) limits both the legal right and practical ability of contractors in that industry to order their own labor relations. By virtue of the proviso, a general contractor has the right to require all other employers working on a particular jobsite to adhere to the terms of a master labor agreement it has entered into with union representatives. Accordingly, the nonunion contractors that are members of respondent ABC would have had no right protected by the NLRA to obtain work on a nonunion basis at the Boston Harbor Project if it had been privately owned, if the owner had retained Kaiser as its general contractor, and if Kaiser, in turn, had entered into a project agreement identical to that challenged here. It follows that MWRA is trenching on no right accorded by the NLRA to nonunion (or other) contractors by requiring them, as a condition of obtain-

ing work on the project, to abide by the union agreement that Kaiser negotiated with MWRA's approval.

b. The majority below in fact acknowledged that "under the exceptions established by Sections 8(e) and 8(f) of the Act, the Master Labor Agreement between the Trades Council and Kaiser is a valid labor contract." MWRA Pet. App. 24a. But it found that conclusion to be "irrelevant to the preemption issue at hand," because the "history of Sections 8(e) and 8(f) discusses private employers only," and nowhere "is there any indication that a state would be allowed to impose this type of regulation." Pet. App. 24a-25a. The majority also believed that "Congress is perfectly capable of distinguishing between states and private parties when it chooses, and it has so chosen here," since Sections 8(e) and 8(f) refer to an "employer," and Section 2(2) (29 U.S.C. 152(2)) excludes from the definition of that term "any State or political subdivison thereof." Pet. App. 27a.

However, as Chief Judge Breyer pointed out in dissent, "Congress had two perfectly good reasons for not making the construction-industry exceptions explicitly applicable to states, and neither of these reasons suggests any preemptive intent." MWRA Pet. App. 41a. First, "the list of forbidden practices, to which the exceptions apply, itself applies only to an 'employer,' defined to exclude 'any State,' thereby leaving the regulation of labor relations between a state and its own employees primarily to state law"; accordingly, a "drafter, writing a statutory exception to the resulting prohibition, would not normally extend its scope beyond those subject to the prohibition in the first place." *Ibid.* Second, when Congress enacted the construction industry exceptions in 1959, it "had little reason to believe that a court might find, hidden in the silence of the Act, some other relevant prohibition applicable to a state." *Ibid.*

Further, this Court has concluded that when Congress enacted Section 8(e)'s construction industry proviso and Section 8(f), it intended to preserve the existing "pattern of collective bargaining in the construction industry." *Woelke & Romero*, 456 U.S. at 657. It therefore is significant that in the detailed testimony preceding enactment of those provisions, the pattern described for construction of public works (*e.g.*, dams, roadways, and bridges) was no different from that for purely private projects.[8] In addition, the reasons identified in the legislative history for authorizing prehire bargaining in the construction industry—the special circumstances making meaningful posthire collective bargaining difficult, the general contractor's need to predict labor costs, and the contractor's need to have available a steady supply of

[8] See, *e.g.*, *Hearings on S. 1973 Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare*, 82d Cong., 1st Sess. 27, 29, 31, 35, 39, 45 (1951); see also Council Pet. 11 (discussing Labor Department study concluding that project agreements have been used for many decades on both private and public development projects).

The Court in *Woelke & Romero* also relied (456 U.S. at 658-659 & n.11) on the discussion in the legislative history of *Associated General Contractors of America, Inc. (St. Maurice, Helkamp & Musser)*, 119 N.L.R.B. 1026 (1957), review denied and enforced *sub nom. Operating Engineers Local Union No. 3* v. *NLRB*, 266 F.2d 905 (D.C. Cir.), cert. denied, 361 U.S. 834 (1959). That case involved a union agreement governing construction work on Travis Air Force Base in California that was undertaken pursuant to a contract with the Army Corps of Engineers. 119 N.L.R.B. at 1027, 1049; 266 F.2d at 906. See also 105 Cong. Rec. 15,541 (1959) (Mem. of Reps. Thompson and Udall, cited in *Woelke & Romero*, 456 U.S. at 662 n.13) ("the building trades unions and contractors follow the practice of working out a scale of wages and other terms of employment which will be applicable to all projects within a specified geographical area for a substantial period of time," and "[t]his practice has been encouraged by the Atomic Energy Commission and other Government agencies"); *Labor-Management Reform Legislation: Hearings on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 86th Cong., 1st Sess. 496 (1959) (testimony of Richard J. Gray, President of Building and Construction Trades Department, AFL-CIO, quoting S. Rep. No. 1509, 82d Cong., 2d Sess. 3-4 (1952)) (the "United States Government * * * is directly concerned in the proper pricing and completion

labor [9]—hold true whether it is a public contractor or a private contractor that lets the contracts for the work. This background greatly undermines the court of appeals' and respondents' notion that Congress, without saying so, intended to deny the States and their political subdivisions the benefits of agreements permitted by Sections 8(e) and 8(f) when they act in a proprietary capacity.

By contrast, we share petitioners' view that the position of the majority below would frustrate congressional intent and produce arbitrary distinctions in prehire practices within the construction industry. Whether there is a prehire union agreement covering an entire project "would often reflect, not size of the project, or desire of the parties, or special conditions of the industry, but simply whether or not the entity letting the contracts is an arm of the state or private." MWRA Pet. App. 40a. And even among state projects, "the presence or absence of such an agreement would depend upon whether state law permits the state in question to have a private contractor (who, then, presumably, would be free to enter into a prehire agreement), or, as in Massachusetts, requires the state agency to sign the relevant contracts itself." *Id.* at 40a-41a.

c. The court of appeals majority also believed that its holding was supported by *Wisconsin Dep't of Industry* v. *Gould*, 475 U.S. 282 (1986), which held that a Wisconsin statute debarring certain repeat violators of the NLRA from doing business with the State was preempted by the NLRA. See MWRA Pet. App. 25a-30a. In rejecting the contention that the State was merely acting as a purchaser of services, the Court acknowledged that "[n]othing in the NLRA * * * prevents private purchasers from

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of construction projects for defense installations and production facilities," and prehire agreements are important for "large projects, particularly for defense installations and plants").

[9] See, *e.g.*, S. Rep. No. 187, 86th Cong., 1st Sess. 27-29 (1959) (reproduced at MWRA Pet. App. 46a-48a); see also Pet. App. 37a-40a (Breyer, C.J., dissenting).

boycotting labor law violators," but added that "[t]he Act treats state action differently from private action * * * because in our system States simply are different from private parties and have a different role to play." 475 U.S. at 290.

Gould, however, is clearly distinguishable from this case. The state debarment rule in *Gould* "serve[d] plainly as a means of enforcing the NLRA," and "[n]o other purpose could credibly be ascribed" to it. 475 U.S. at 287. Here, by contrast, MWRA is not seeking to enforce the NLRA, punish NLRA violators, or further any regulatory role. It seeks only to protect its *own* proprietary interests in the stable and efficient development of a major governmental project, and it does so, as a private developer would, through lawful arrangements relating to project labor agreements. Indeed, the labor agreement in issue here actually was negotiated, apparently without direction from MWRA, by Kaiser, the private construction manager and general contractor that MWRA selected.

Nothing in *Gould* suggests that where, as here, the State is seeking to further its legitimate proprietary concerns through an arrangement expressly authorized by the NLRA, its action nevertheless is preempted. To the contrary, the *Gould* Court specifically noted that it was "not say[ing] that state purchasing decisions may never be influenced by labor considerations," and that it was "not faced here with a statute that can even plausibly be defended as a legitimate response to state procurement constraints or to local economic needs." 475 U.S. at 291. This case directly implicates those concerns, and thus presents the issue left open by *Gould*.

3. We recognize that the First Circuit decsion does not conflict with the decision of any other court of appeals, but we nevertheless believe that review by this Court is warranted. The preemption analysis adopted in this case has invalidated a major contractual undertaking by the Commonwealth of Massachusetts, and thereby threatened the

timely, cost-effective clean-up of the Boston Harbor.[10] The decision also casts doubt on the validity of similar project labor agreements that have been utilized for the construction of a wide variety of public projects (both state and federal), including hospitals, tunnels, airports, convention centers, hydroelectric projects, waste treatment facilities, and mass transit systems. See Council Pet. 12-13 & n.5; MWRA Pet. 12; California, *et al.*, Amicus Br. 2 n.1.[11] In the circumstances of these projects, the responsible governmental entities, including federal agencies, found that such agreements were important to ensuring stability, an available labor supply, and timely completion of major construction projects needed to further substantial public purposes. The undertaking of such public projects is a central function of state and

[10] We are advised that the unions have only agreed to continue to honor the agreement pending the outcome of the proceedings in this Court. If certiorari is not granted, the unions may seek to repudiate the agreement, on the premise that a fundamental term of the bargain has been invalidated.

[11] Respondents attempt (Br. in Opp. 5) to distinguish between "union-only" project agreements and those that "establish certain conditions of employment without interfering in the process of collective bargaining." They assert that "there is no evidence in the record of this case that 'union-only' project agreements are 'widely-used' by state or local governments anywhere in the country." However, as the Unions point out (Council Reply Br. 4-5), respondents "offer no evidence that there are, in actual practice, two distinct types of project labor agreements, or that in the public sector, use of the supposedly 'less offensive' type of agreement predominates." Indeed, the Baltimore Harbor Tunnel Thruway agreement (see C.A. App. 451), the only agreement cited by respondents as an example of the supposedly "less offensive" type, requires all contractors to abide by a collective bargaining agreement and recognize union representation of their employees. See C.A. App. 455, 462-463. Moreover, as the Council observes (Reply Br. 5), "a public entity's decision to require contractors to adhere to a supposedly 'less offensive' project agreement—which is still a collectively bargained agreement that 'establish[es] certain conditions of employment' * * * for all project work"—would also appear to be unlawful under the First Circuit's reasoning.

local governments. Such projects therefore "implicate[] 'interests so deeply rooted in local feeling and responsibility,' that pre-emption should not be inferred." *Gould*, 475 U.S. at 291 (quoting *Garmon*, 359 U.S. at 243-244).

A number of similar challenges have in fact been filed in at least three other circuits. These cases indicate that the issue is a recurring one, that this Court will ultimately have to resolve the question, and that deferring review has highly adverse consequences for state and local governments. Relying on the decision below, a divided panel of the Eighth Circuit recently enjoined the City of Minneapolis from using a project labor agreement in its construction of a new municipal bridge. See *Glenwood Bridge, Inc.* v. *City of Minneapolis*, 940 F.2d 367 (1991). Challenges to public works projects carried out under similar arrangements are also now pending in two other circuits where the preemption claims were rejected by the district courts. *Phoenix Engineering, Inc.* v. *M-K Ferguson of Oak Ridge Co.*, No. Civ. 3-90-839 (E.D. Tenn. Mar. 22, 1991), appeal pending, No. 91-5527 (6th Cir.) (rejecting claim that NLRA prohibited involvement by Department of Energy in project labor agreement for construction services at Department's Oak Ridge Operations); *Areo Electric* v. *Watkins*, No. CV 90-0075-E-EJL (D. Idaho May 14, 1991) (rejecting claim that NLRA bars project labor agreement on Department of Energy project); *Associated Builders & Contractors* v. *City of Seward*, No. A91-001 (D. Alaska Mar. 20, 1991), appeal pending, No. 91-35511 (9th Cir.) (granting summary judgment in favor of the city). Although other circuits may ultimately reject the view of the First and Eight Circuits, there is no reason to expect the en banc resolution of the First Circuit to change. On balance, we therefore believe that the States' rights to engage in such conduct should be settled at this time.[12]

[12] There is no merit to respondents' contention (Br. in Opp. 15) that this Court should not grant review because the court of appeals' decision was rendered on appeal from the denial of a pre-

CONCLUSION

The petitions for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

MAUREEN E. MAHONEY
Deputy Solicitor General

D. RANDALL FRYE
Acting Deputy General Counsel

EDWIN S. KNEEDLER
Assistant to the Solicitor General

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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liminary injunction and the case is therefore at an interlocutory stage. The court of appeals has decided that MWRA may not require prospective contractors to adhere to the project agreement as a condition of bidding for work. That decision, which was rendered first by a panel and then by the court sitting en banc, determines with finality the legal issue of federal preemption involved in this case. In these circumstances, the issue is ripe for review by this Court. See *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 51 (1938); see also *Laborers* v. *Curry*, 371 U.S. 542, 552 (1963).

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